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**FILED AUGUST 8, 2008**

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6 Trustee

7  
8 UNITED STATES BANKRUPTCY COURT  
9 DISTRICT OF NEVADA

10 In re  
11 HDB, LLC,

12 Debtor.

Chapter 11  
No. BK-S-08-10685-BAM

13 Date: September 9, 2008  
14 Time: 9:30 a.m.

15  
16 **MOTION FOR AUTHORITY TO OBTAIN CREDIT**  
17 **ON A SUPERPRIORITY ADMINISTRATIVE BASIS**  
**PURSUANT TO 11 U.S.C. § 364(c)(1)**

18 TIMOTHY S. CORY, Chapter 11 Trustee (“Trustee”) for the estate of HDB, LLC  
19 (“Debtor”), submits this Motion for Authority to Obtain Credit on a Superpriority  
20 Administrative Basis Pursuant to 11 U.S.C. § 364(c)(1). This Motion is made and based  
21 upon 11 U.S.C. § 364(c)(1), Fed.R.Bankr.P. 2002, 4001(c) and 9014, upon these moving  
22 papers, the following Memorandum of Points and Authorities, the accompanying  
23 Declaration of Timothy S. Cory, Trustee (“Cory Declaration”), the record in this case,  
24 including the pleadings and documents filed on behalf of the parties, the arguments and  
25 representations of counsel, and any oral or documentary evidence presented at or prior to  
26

1 the time of the hearing.

2 This Motion specifically requests that the Court enter an order:

3 1. Approving, pursuant to 11 U.S.C. §364(c)(1), postpetition financing in an  
4 amount not to exceed Two Hundred Fifty Thousand (\$250,000) Dollars (the “364(c)(1)  
5 Loan”), and for the Trustee to adopt and execute all of the necessary loan documents  
6 which shall evidence the terms and conditions of the 364(c)(1) Loan. The principal term  
7 sheet for the 364(c)(1) Loan is attached to the Cory Declaration as Exhibit 1.

8 2. Approving the terms and conditions of the 364(c)(1) Loan and authorizing  
9 the Trustee to enter into the 364(c)(1) Loan on a final basis.

10 3. Authorizing the Trustee to enter into the loan documents necessary to obtain  
11 the 364(c)(1) Loan and take the all of the actions necessary to satisfy the conditions of the  
12 364(c)(1) Loan.

13 4. Authorizing the Trustee, pursuant to 11 U.S.C. § 364(c)(1), to grant a  
14 superpriority administrative expense for the 364(c)(1) Loan on a final basis.

15 5. For such other and further relief as the Court deems appropriate under the  
16 circumstances.

## 17 **MEMORANDUM OF POINTS AND AUTHORITIES**

### 18 **A. Jurisdiction and Proceedings**

19 1. The Court has jurisdiction over this case and this Motion pursuant to 28  
20 U.S.C. § § 157 and 1334. This is a core proceeding within the meaning of 28 U.S.C.  
21 § 157(b)(2)(A). Venue is proper in this District pursuant to 28 U.S.C. § § 1408 and  
22 1409(a).

23 2. On January 28, 2008, the Debtor filed its voluntary petition under chapter 11  
24 of the United States Code and it is operating its business pursuant to sections 1107(a) and  
25 1108 of the Bankruptcy Code.

26 3. On January 29, 2008, the Bank Group, together with Aspen, filed their Joint

1 Motion to Appoint Trustee Pursuant to 11 U.S.C. § 1104(a), together with declarations in  
2 support thereof. *See* Docket 13.

3 4. On February 1, 2008, Debtor filed its Consent to Appointment of a Chapter  
4 11 Trustee Pursuant to 11 U.S.C. § 1104(a). *See* Docket 35.

5 5. On February 15, 2008, the Court entered an Order Approving Joint Motion  
6 to Appoint Trustee Pursuant to 11 U.S.C. § 1104(a). *See* Docket 55.

7 6. On February 21, 2008, the Court entered an Order Approving Appointment  
8 of Timothy S. Cory as Trustee for the Estate of HDB, LLC, and since that date, the  
9 Trustee has been operating the Debtor's Business pursuant to 11 U.S.C. § 1108. *See*  
10 Docket 69.

11 7. On April 14, 2008, the U.S. Trustee appointed an Official Committee of  
12 Unsecured Creditors pursuant to 11 U.S.C. § 1102(a)(1) and (b)(1). *See* Docket 171.

13 8. On May 5, 2008, the Trustee filed a Motion to Approve Stipulation  
14 Regarding (A) Use of Cash Collateral by Debtor Pursuant to 11 U.S.C. § 363(c)(2); (B)  
15 Granting Adequate Protection Pursuant to 11 U.S.C. §§ 361 and 363(e); and (C)  
16 Authorizing Post-Petition Financing on a Senior Secured Basis Pursuant to 11 U.S.C. §  
17 364(d)(1) (the "364 Loan Motion"), Docket No. 205, to approve the 364 Loan  
18 Stipulation, and the various declarations in support thereof, including the Trustee  
19 Financing Declaration, Furnas Financing Declaration, Hainsworth Financing Declaration  
20 and Carr Financing Declaration. *See* Docket Nos. 206, 209, 210 and 108.

21 9. On May 9, 2008, the Trustee filed a Motion For Entry Of An Order  
22 Establishing Procedures For And Authorizing: (1) Unit Sales, Free And Clear Of Liens,  
23 Claims And Interests Pursuant to 11 U.S.C. § 363; and (2) Resolution And Payment Of  
24 Claims (the "363 Motion"), Docket No. 232.

25 10. On June 26, 2008, the Trustee filed a Motion to Authorize Transfer of  
26 Permits by Debtor's Authorized Representative, Mark Oiness, or in the Alternative,

1 Ordering Immediate Transfer of Permits, Docket 296, which was granted by Order  
2 entered July 2, 2008, Docket 412.

3 11. On July 8, 2008, the Trustee vacated the July 11, 2008 hearing on the 364  
4 Loan Motion and the 363 Motion. The Trustee continues to negotiate with the Bank  
5 Group members and their counsel in his constant efforts to secure sufficient construction  
6 financing to support an Amended 364 Loan Motion and Amended 363 Motion.

### 7 **B. Relevant Facts**

#### 8 **Debtor's Business and Property**

9 12. Debtor is the owner of approximately 20.8 acres of real property (the  
10 "Property") located in Las Vegas, Clark County, Nevada, upon which Debtor is  
11 developing a residential condominium community known as "Mira Villa" ("Business").  
12 The Debtor's assets consist of real and personal property assets, including a bank account  
13 at Colonial Bank and a bank account at Nevada State Bank ("Prepetition Bank Accounts")  
14 The Property is in the Summerlin community, which is within the northwest portion of the  
15 Las Vegas Metropolitan Area. See Cory Declaration, ¶ 4.

16 13. Debtor is constructing approximately 113 condominium units (the "Unit" or  
17 "Units") within 21 buildings located on approximately 10.88 acres of the Property (the  
18 "Building" or "Buildings"), together with a clubhouse, a swimming pool and certain  
19 landscape and improvements located on the common elements or common areas  
20 throughout the Property ("Common Area" or "Common Elements", and collectively with  
21 the Units and Buildings, the "Project")<sup>1</sup>. Each Building is a four-story structure with  
22 garage parking on the ground level and either five or six Units within each Building. Of  
23 the 113 Units, five (5) Units are being constructed as models in two (2) Buildings. The

24 <sup>1</sup> Appurtenant to the sale of Units is the undivided interest in all of the Common Elements  
25 throughout the Property as required under NRS Chapter 116. Accordingly, references in this  
26 Stipulation to a Unit, Units or the Buildings in which the Units are located, incorporate (without  
further specific description) such undivided interest(s) in the Common Elements.

1 remaining approximately 9.92 acres (the "Partially Developed Parcel") has some Common  
 2 Area improvements (i.e., curb, gutter, streets, and underground utilities). See Cory  
 3 Declaration, ¶ 5.

4 14. The Debtor commenced construction of improvements on the 113 Units  
 5 located in 21 Buildings within Parcel Two<sup>2</sup> and a portion of Parcel One<sup>3</sup> and Parcel Three<sup>4</sup>  
 6 and has commenced improvements on certain Common Lots on the Property. Completion  
 7 of construction has been repeatedly delayed, and it remains to be completed. The Units  
 8 range from 60% to 75% complete with the model Units being from 90% to 98%  
 9 completed. See Cory Declaration, ¶ 6.

10 15. Debtor has asserted at various times that it is party to various numbers of  
 11 contracts of sale ("Prepetition Sale Contracts") for Units. None of the Prepetition Sale  
 12 Contracts had closed as of the Petition Date and none of the prospective purchasers is in  
 13 possession of any of the Units. Earnest money deposits made by Purchasers pursuant to  
 14 the Prepetition Sale Contracts are presently held on deposit with Equity Title Company  
 15 and Stewart Title Company ("Earnest Money Deposits") pursuant to the terms and  
 16 conditions of the Prepetition Sale Contracts and as required pursuant to Nevada law. See  
 17 Cory Declaration, ¶ 7.

#### 18 **Estate's Need for Additional Funds**

19 16. On a monthly basis, the Trustee incurs security, preservation and  
 20 maintenance expenses of between \$90,000 and \$112,000 per month. This amount

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21 <sup>2</sup> "Parcel Two" constitutes a portion of the Property lying within the exterior boundaries of the  
 22 Final Map of Mira Villa Condominiums - Unit 2. Units located in Buildings 12 through 19, and  
 Buildings 31 and 32 and Common Area identified as A through D are part of Parcel Two.

23 <sup>3</sup> "Parcel One" constitutes a portion of the Property lying within the exterior boundaries of the  
 24 Final Map of Mira Villa Condominiums - Unit 1. Units located in Buildings 20 through 30,  
 Building 40 and Common Area identified as A through G are part of Parcel One.

25 <sup>4</sup> "Parcel Three" constitutes a portion of the Property lying within the exterior boundaries of the  
 26 Final Map of Mira Villa Condominiums - Unit 3. Units located in Buildings 6 through 11, 33  
 through 35 and Common Area identified as A through D are part of Parcel Three.

1 represents the costs necessary to physically secure the Property on a 24 hour basis,  
2 properly insure the Property for casualty and property losses, and to pay utility and other  
3 service providers to preserve and maintain the Property. See Cory Declaration, ¶ 8.

4 17. The Trustee requires additional funds because only \$57,415.95 remains in  
5 the Prepetition Bank Accounts, which is not sufficient to satisfy the preservation and  
6 maintenance expenses for August, 2008. Expenses for August, 2008 are projected at  
7 \$92,252.25, resulting in a shortfall of \$34,836.30 for the month of August. See Cory  
8 Declaration ¶ 9, and Monthly Expense Projection, Cory Declaration Exhibit 2.

9 18. Additionally, the Trustee will require funds in the approximate amount of  
10 \$215,000 to satisfy preservation and maintenance expenses for September and October of  
11 2008. Expenses for September are projected at just under \$103,000, and expenses for  
12 October are projected at just under \$112,000. See Cory Declaration ¶ 10, and Monthly  
13 Expense Projections, Cory Declaration Exhibits 3 and 4.

14 19. Although the Trustee continues his efforts to secure financing for  
15 completion of the Project, the Trustee believes that it is necessary and in the best interests  
16 of the estate to obtain this interim, short term loan to secure, preserve and maintain the  
17 Property. The Trustee has therefore filed this motion seeking postpetition financing in an  
18 amount not to exceed \$250,000, and in the exercise of his reasonable business judgment  
19 he seeks approval of the 364(c)(1) Loan. See Cory Declaration ¶ 11.

20 **Trustee's Efforts to Find Alternative Financing**

21 20. In addition to his discussions with the Bank Group, the Trustee has spoken  
22 with Robert Adamo of Mountain Funding and Steve Petri of Summit Investment  
23 regarding this loan. He received a proposal from Mountain Funding for a loan in the  
24 amount of \$750,000, that would require a senior secured lien on the entire Property, not  
25 just the Project, and would necessarily require a priming lien battle with the Bank Group  
26 and Aspen. Additionally, the Mountain Funding loan had a 4% commitment fee, a twelve

1 percent (12%) interest rate and a \$50,000 exit fee. No proposal was received from  
2 Summit Investment. See Cory Declaration ¶12.

3 21. The Trustee has made a good faith effort to find less burdensome credit  
4 from sources other than the Bank Group. However, the only alternative proposal that he  
5 received was from Mountain Funding on terms and conditions that are considerably less  
6 favorable than the proposed 364 Loan from the Bank Group. See Cory Declaration ¶13.

### 7 C. LEGAL AUTHORITY

#### 8 1. Approving the 364(c)(1) Loan is Appropriate

9 A Trustee is authorized to operate the Debtor's business under Bankruptcy Code  
10 section 1108. As part of that operation, the Trustee may incur unsecured debt in the  
11 ordinary course of business. 11 U.S.C. § 364(a). The Bankruptcy Code offers a Trustee  
12 additional flexibility to the extent that he needs additional credit, but cannot attract such  
13 credit on unsecured terms. Section 364 provides a progression of various protections to  
14 induce a postpetition lender to extend credit to a debtor in possession.

15 As a condition to extending the 364(c)(1) Loan, the Bank Group required the  
16 protections contained in Bankruptcy Code section 364(c)(1), which provides:

17 If the trustee is unable to obtain unsecured credit allowable  
18 under section 503(b)(1) of this title as an administrative  
19 expense, the court, after notice and a hearing, may authorize  
the obtaining of credit or the incurring of debt –

20 (1) with priority over any or all administrative expenses  
21 of the kind specified in section 503(b) or 507(b) of this title.

#### 22 2. Alternative Financing On Better Terms Is Not Available

23 The Trustee has made a good faith effort to obtain unsecured credit on a general  
24 unsecured or administrative priority basis from other sources. When time is of the  
25 essence, this is all that is required. *See, e.g., id.; In re Reading Tube Indus.*, 72 B.R. 329,  
26

1 333 (Bankr. E.D. Pa. 1987); In re Stacy Farms, 78 B.R. 494, 498 (Bankr. S.D. Ohio 1987).

2 Prior to entering into the 364(c)(1) Loan with the Bank Group, the Trustee sought  
3 financing from other sources. Although the Trustee received an alternative proposal from  
4 Mountain Funding, the Mountain Funding proposal required collateral in the form of a  
5 priming lien on the entire Property that would likely draw objections from the Bank  
6 Group and Aspen. Additionally, the Bank Group 364(c)(1) Loan is on more favorable  
7 terms and conditions because it does not require a priming lien. Under the circumstances,  
8 the Trustee has therefore sufficiently satisfied the requirements of section 364(c)(1).

#### 9 **D. CONCLUSION**

10 The Court should therefore enter an Order:

11 1. Approving, pursuant to 11 U.S.C. §364(c)(1), postpetition financing in an  
12 amount not to exceed Two Hundred Fifty Thousand (\$250,000) Dollars (the “364(c)(1)  
13 Loan”), and for the Trustee to adopt and execute the all of the necessary loan documents  
14 which shall evidence the terms and conditions of the 364(c)(1) Loan. A summary of  
15 principal terms for the 364(c)(1) Loan is attached as Exhibit 1.

16 2. Approving the terms and conditions of the 364(c)(1) Loan and authorizing  
17 the Trustee to enter into the 364(c)(1) Loan on a final basis.

18 3. Authorizing the Trustee to enter into the loan documents necessary to obtain  
19 the September 364(c)(1) Loan and take the all of the actions necessary to satisfy the  
20 conditions of the September 364(c)(1) Loan.

21 4. Authorizing the Trustee, pursuant to 11 U.S.C. § 364(c)(1), to grant  
22 superpriority administrative expense for the 364(c)(1) Loan on a final basis.

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1           5.     For such other and further relief as the Court deems appropriate under the  
2 circumstances.

3                               Respectfully submitted,

4                               FENNEMORE CRAIG, P.C.

5                               /s/ Laurel E. Davis

6                               By \_\_\_\_\_  
7                               Laurel E. Davis

8                               Counsel for Timothy S. Cory,  
9                               Chapter 11 Trustee